TEAM CODE: Z

IN THE HON'BLE SUPREME COURT OF INDIA

SPECIAL LEAVE PETITION FILED UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA

IN APPEAL NO: _____/ 2014

IN THE MATTER OF

FOREIGN LENDERS OF JEEVANI & Ors.

V.

LIFELINE LIMITED & Ors.

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT

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ONLINE RESOURCES

1. http://www.cci.gov.in/
2. http://www.manupatrafast.in/
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STATEMENT OF JURISDICTION

THE RESPONDENTS, HEREBY HUMBLY SUBMITS THIS MEMORANDUM BEFORE THE HON'BLE SUPREME COURT OF INDIA IN REPLY TO THE MEMORANDUM FILED BY THE PETITIONERS INVOKING THE JURISDICTION OF THIS HON'BLE COURT UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA.

STATEMENT OF FACTS

1. Jeevani Limited and Lifeline Limited merged in 2012 by a scheme of arrangement for Jeevani, by which the three promoters of Jeevani, had to sell their entire promoter shareholding (18%) to Lifeline. This sale of stake was affected vide a separate sale agreement between Lifeline and the Promoters which contained specific representations as regards disclosure of vital information by either of the parties. The Scheme was filed before the Bombay Stock Exchange for its approval, which was not granted. Jeevani and Lifeline filed an application under Section 391 of the Companies Act, 1956 before the Delhi HC for initiating the process of approval of the Scheme. A meeting of the Creditors was ordered. Subsequent to the meeting, the Scheme was approved by the majority and later by the Court.
2. Some foreign lenders who had been parties to a consortium agreement with Jeevani, made an application before the Delhi HC for the recall of the order approving the Scheme. The foreign lenders have an arbitral award in their favour granted by a foreign arbitral tribunal in Hong Kong against Jeevani. The application of the foreign lenders being rejected, both by the Hon'ble Company Judge and the Division Bench of the Delhi HC, the lenders have now filed an appeal before the Supreme Court.
3. Lifeline, which continued with the operations of the erstwhile Jeevani of supplying generic drugs to the USA, received a notice from the FDA for providing drug below par quality. Lifeline filed a suit against the Promoters before the Delhi HC for damages arising out of breach of the contract by way of defrauding and misrepresenting to Lifeline, after it was unearthed that the investigation by FDA on drugs produced by Jeevani had commenced before the Scheme took place.

4. The Promoters contended that the Delhi HC has no jurisdiction to hear the matter as the agreement between the parties had an arbitration clause in it. The Hon'ble Single Judge of the Delhi HC held that the said clause could not be regarded as an arbitration clause. The same was challenged by the Promoters before the Division Bench of the Delhi HC, which held otherwise.. Lifeline has approached the SC of India challenging this order.
5. Soon after the merger, Lifeline decided to introduce a new life saving drug 'Novel', which was much cheaper, by further developing the active R&D of the erstwhile Jeevani. Swasth, a sister concern of Jeevani had sometime in the year 2010 got assigned absolute rights to a few of the developed and competed R&D and IPRs of Jeevani. Before Novel was launched, Swasth filed a suit of infringement of its IPRs against Lifeline, as Novel was substantially similar to Inventive (A product of Swasth), and also obtained an interim injunction against them from launching Novel. In the meanwhile, Swasth launched a similar cost effective drug, cornering a major chunk of the market, after which it vacated the injunction filed against Lifeline.
6. Lifeline filed an application before the CCI alleging Swasth abused dominant position by indulging in bad faith litigation. CCI directed the DG CCI to investigate on the matter. Swasth filed a Writ Petition in the Delhi HC against Lifeline and CCI, and submitted that the order CCI was bad in law as it was just trying to protect its IPRs, and cannot be held, even *prima facie* to be abusing its dominance. The Delhi HC and later a Division bench did not find any reason to interfere with the investigation as no adverse effect was caused to Swasth and accordingly Swasth appealed to the Supreme Court against the order of the Division Bench.
7. Since the litigations involve the same parties and disputes arise out of the same transactions and also on the request of the Counsel's appearing, the Supreme Court has tagged the matters together for hearing.

STATEMENT OF ISSUES

ISSUE 1: WHETHER THE FOREIGN LENDERS OF JEEVANI ARE CREDITORS TO THE COMPANY AND WHETHER THE SCHEME CAN BE SET ASIDE

ISSUE 2: WHETHER THE PARTIES ARE BOUND BY THE ARBITRATION CLAUSE IN THE AGREEMNT BETWEEN THEM AND WHETHER FRAUD WAS COMMITTED BY THE PROMOTERS

ISSUE 3: WHETHER SWASTH HAS ABUSED ITS DOMINANT POSITION BY INDULGING IN BAD FAITH LITIGATION AND WHETHER THE INVESTIGATION OF THE DG CCI SHOULD BE INTERFERED WITH.

SUMMARY OF PLEADING

I. THE FOREIGN LENDERS OF JEEVANI ARE CREDITORS TO THE COMPANY AND THE SCHEME SHOULD NOT BE SET ASIDE.

The foreign lenders are not creditors to the company. Jeevani was merely a party in the consortium. Therefore, by the virtue of it being a joint venture, created for the purpose of achieving profits, the foreign lenders do not become the creditors of the company. Creditors who have secured a decree are regarded not as a separate class from other creditors of the same category. All secured creditors-whether lenders in foreign currency and lenders in Indian rupees constitute one single class of creditors. The scheme should not be set aside as it has been held that Unless the- scheme is effectively shown to be unfair, the court shall be slow to reject the scheme at the outset as its approach should be in favor of reviving the industry rather than closing it down.

II. THE PARTIES ARE BOUND BY THE ARBITRATION CLAUSE IN THE AGREEMENT BETWEEN THEM AND NO FRAUD WAS COMMITTED BY THE PROMTERS

It has been held by the SC that the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not necessary in an arbitration agreement if it has the attributes or elements of an arbitration agreement. The Supreme Court has also held that a person being an employee of one of the parties cannot per se be a bar to his acting as an Arbitrator. Hence the Arbitration clause is valid and the parties are bound by it.

According to the Agreement entered into by the Lifeline and the Promoters, they were obligated to share any vital information relating to the transaction. The fact that it was a

mere investigation thus implies that it was not vital information, without any relevance to the transaction. Thus no fraud was committed by the Promoters.

III. SWASTH HAS ABUSED ITS DOMINANT POSITION BY INDULGING IN BAD FAITH LITIGATION AND THE INVESTIGATION OF THE DG CCI SHOULD NOT BE INTERFERED WITH.

It is humbly submitted that the Competition Commission of India (CCI) had the jurisdiction to hear the issue as filed by the informant (Lifeline).

It is further submitted that the CCI is empowered to direct its DG to inquire into a matter in which the Commission has formed a *prima facie* opinion a certain enterprise or group is indulging in activities in violation of Section 3 or Section 4 of the Competition Act. The CCI after taking into account several factors such as the market share, temporary injunction, patent-linkage, was of a *prima facie* opinion that the petitioner might have abused its dominant position in the market, and thus ordered the DG CCI to inquire into the matter and submit a report within 45 days. The investigation is just for the collection of evidences, and in no way causes any adverse effect to the petitioner

ARGUMENTS ADVANCED

I. THE FOREIGN LENDERS ARE NOT CREDITORS AND THE SCHME SHOULDN'T BE SET ASIDE

1.1.The Appellants are not Creditors of the Company

Every person having a pecuniary claim against the company, whether actual or contingent is a creditor.[1] Any person having a pecuniary claim against the company capable of estimate is a creditor.[2] The Foreign Lenders do not have any pecuniary claim on Jeevani. The Arbitral Award in favour of the Foreign Lenders is not a valid claim against the company unless it is enforced by an Indian Court[3]. When the merger occurred, foreign lenders did not have any enforceable claim against the Company thus failing to qualify as the Creditors.

A consortium has been defined as "an association of two or more business entities of different nationalities temporarily joined together for the performance of a limited task".[4] It is "an ad hoc or ongoing, informal or formal, sometimes 'shell', association of two or more business/governmental/financial entities to profitably pursue, generally on a competitive basis, one or more common commercial activities."[5] The term business consortium is a British term for a joint venture.[6]

[1] Halsbury's Laws of England, 5th Edition 2007

[2] Palmer's Company Law, 24th edition

[3] S. 48 of Arbitration and Conciliation Act, 1996

[4] Hannon, Use of an International Consortium in a Major International Project, in 1970 PRIVATE INVESTORS ABROAD 103, 105.

[5] C. DHAWAN & L. KRYZANOWSKI, EXPORT CONSORTIA: A CANADIAN STUDY 9-10 (1978)

[6] A. BOULTON, BUSINESS CONSORTIA 41 (1961)

Here, Jeevani was merely a party in the consortium. Therefore, by the virtue of it being a joint venture, created for the purpose of achieving profits, the foreign lenders do not become the creditors of the company.

1.2.<u>The appellants are not a special class of Creditors.</u>

The respondent humbly submits that the appellants do not constitute a special class. In *Sovereign Life Assurance Co.* v. *Dodd*[7], the Court had to consider whether certain creditors formed a single class or two different classes. It was held: "I*t seems plain that we must give such a meaning to the term class as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.*"

In *re Maneckchowk & Ahmedabad Mfg. Co. Ltd.*[8], it was held that: "*Speaking very generally, in order to constitute a class, members belonging to the class must form a homogenous group with commonality if interest.*"

Therefore, there are two criteria to form a separate class- commonality of interests and a homogenous group. Creditors can be divided into three categories of preferential creditors, secured creditors and unsecured creditors, each having a commonality of interest. A separate class within a class can be created only if it is proved that the rights of that separate class was different from the other creditors in the same class.[9] In the given facts, there is nothing given to show that the consortium of banks had special rights which could make them a special sub class within a class of secured or unsecured creditors.

[7] Sovereign Life Assurance Co. v. Dodd (1892) 2 QBD 573 (CA)

[8] Re Maneckchowk & Ahmedabad Mfg. Co. Ltd. (1970) 40 Com Cases 819 (Guj.)

[9] Miheer H. Mafatlal v. Mafatlal Industries Limited, (1997) 1 SCC 579

In *Commerzbank AG & Anr.* v. *Arvind Mills*,[10] the Court held that all secured creditors-whether lenders in foreign currency and lenders in Indian rupees constitute one single class of creditors. The foreign creditors were not entitled to be treated as a different class of creditors, a class within the class as there was no conflict of commercial interest between the creditors. Applying the said cases in the present circumstances, the consortium of banks, merely because they are foreign lenders, do not constitute a special class by the virtue of them being foreign creditors.

It is also humbly submitted before the Honorable Court that holding an arbitral award or a decree does not make the foreign lenders a separate class. The award given by the arbitral tribunal in Hong Kong is not a foreign award under S.44 of the Arbitration and Conciliation Act, 1996. Under S. 44 of the Act, a foreign award is an award passed in such territory as the Central Government by notification may declare to be a territory to which the New York Convention applies. During the time the Award was given, Hong Kong was not notified by the Government of India to be a signatory to the New York Convention. Therefore, the said award given is not a foreign arbitral award under the Arbitration and Conciliation Act, 1996.[11]

The arbitral award is not a decree until it is enforced by the Indian Courts.[12] Creditors who have secured a decree are regarded not as a separate class from other creditors of the same category, as defined in *Jalpaiguri Banking and Trading Co. Ltd., Re*[13] and affirmed by the Delhi High Court in the recent decision of *Spice Jet Ltd. & Ors. v. Malanpur Steel Ltd. &*

[10] Commerzbank Ag. and Anr. v. Arvind Mills, 2002 110 CompCas 539 Guj.

[11] http://www.herbertsmithfreehills.com/-/media/HS/L-180912-18.pdf last accessed on 31-08-2013

[12] S. 48 of Arbitration and Conciliation Act, 1996

[13] Jalpaiguri Banking and Trading Co. Ltd., R*e* (1935) 5 Com Cases 335

Anr. Applying the above cases to the facts, even though the lenders have an arbitral award in their favour and even if the said award is enforceable; it does not make the foreign lenders a special class of lenders.

It was held in *Gujarai Kamdar Sahakari Mandal and Ors.*v. *Ramkrishna Mills Ltd.*,[14] the court has initially to see as to whether the scheme is fair or not. Unless the scheme is effectively shown to be unfair, the court shall be slow to reject the scheme at the outset as its approach should be in favor of reviving the industry rather than closing it down. The Foreign lenders have not shown how their rights have or will be affected by this merger as the award could be enforced even after the merger. Also, they had more than two years to enforce their Award which have failed to do till now.

Thus, it is submitted before this Hon'ble Court that the Scheme should not be set aside.

II. THE PARTIES ARE BOUND BY THE ARBITRATION CLAUSE AND NO FRAUD WAS COMMITTED BY THE PROMTERS

2. 1. The Dispute Resolution clause from the share sale agreement is an arbitration clause

An arbitration agreement is an agreement in writing, by the parties to, submit to arbitration all, or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[15] It may be a separate agreement or an arbitration clause in the agreement.[16]. The Supreme Court, in *Jagdish*

[14] Gujarai Kamdar Sahakari Mandal and ors.v. Ramkrishna Mills Ltd.,1998 (92) Com Cases 692

[15] S. 7 of Arbitration and Conciliation Act,1996

[16] *Id.*

Chander v. *Ramesh Chander,* [17] has defined some of the essential attributes of an arbitration agreement as:

"(a) The agreement should be in writing; (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal;(c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it; and (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them."[18]

Here the impugned Clause contains all the four characteristics enlisted above. While the Clause forming the part of the agreement was in writing, the phrase *"Decision of an empowered committee comprising of (three) executive level personnel of the Company shall be final, binding and conclusive on parties to this Agreement"* refers the decision to a private impartial tribunal, whose decision has to be binding, satisfies the other three requisites for a Clause to qualify as an Arbitration Clause. It was also held in the same case[19] that the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not necessary in an arbitration agreement if it has the attributes or elements of an arbitration agreement. Thus, even though the word Arbitration has not been used in the said Clause, it can be construed as an Arbitration Clause.

[17] Jagdish Chander v. Ramesh Chander , (2007) 5 SCC 719

[18] *Id.*

[19] Jagdish Chander v. Ramesh Chander , (2007) 5 SCC 719

2.2 <u>The arbitration clause is not biased or ambiguous</u>:

Lord O'Brian, CJ, in *Rex v. Justice of County Tryone*[20], defined bias as "a real likelihood of an operative prejudice, whether conscious or unconscious". In the case of *Kumaon Mandal Vikas Nigam Limited v. Girija Shankar Pant*[21], the Supreme Court held that for bias of an arbitrator to be proved, the circumstances should be such as would lead a fair minded and informed observer to conclude that the Tribunal was biased. An allegation of bias on the tribunal cannot be made even before the arbitration has taken place. None of the Executive Committee members (persons referred to in the agreement) have even functioned as an Arbitrator.

The Supreme Court, in *Indian Oil Corporation Ltd. v. Raja Transport*[22] held that a person being an employee of one of the parties cannot per se be a bar to his acting as an Arbitrator, affirming its earlier decision in *Union of India v Singh Builder Syndicate.*[23] Thus, an allegation of bias cannot be made relying only, on the fact that the Arbitral Tribunal would comprise of the Executive Committee of the merged company. Unless Actual bias can be proved, the Clause should stand.

2.3.<u>The matter should be sent to the Empowered Group as per the terms of agreement:</u>

According to the impugned clause, all disputes including questions related to the meaning, scope and interpretation of the contract has to be decided by the tribunal.

[20] Rex v. Justice of County Tryone, (1909) 2 IR 763

[21] Kumaon Mandal Vikas Nigam Limited v. Girija Shankar Pant (2001) 1 SCC 182

[22] Indian Oil Corporation Ltd. v. Raja Transport, (2009) 8 SCC 520

[23] Union Of India v Singh Builder Syndicate, (2009) 2 Arb LR 1,7

Section 16(1)(a) of the Arbitration and Conciliation Act, 1996 says that the arbitration agreement has to be treated as an agreement independent, of the other terms of the contract. The arbitration clause has to be treated as an independent agreement so that the illegality of the main contract would not by itself affect the validity of arbitration agreement.[24] Therefore, even if the contract is null and void, it does not entail *ipso jure* the invalidity of arbitration clause. The doctrine of *Kompetenze-Kompetenze* is enshrined in S.16 of the Arbitration and Conciliation Act, 1996. *Kompetenze-Kompetenze* means an arbitral tribunal is allowed to make a decision on whether it has jurisdiction over an issue that needs to be settled and whether an arbitration agreement is valid.[25] In line with the principle of *Kompetenze-Kompetenze*, validity or expiry of an agreement that includes an arbitration clause does not necessarily mean that an arbitration agreement is invalid or has expired.

The Supreme Court, in *P. Anand Gajapathi Raju v. P. Ganapathi Raju*[26], said that S.8 of the Arbitration and Conciliation Act, 1996 is pre-emptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitration[27]. The Supreme Court, in *N. Radhakrishnan v. Maestro Engineers*[28], had suggested that allegations of fraud and similar grave circumstances would oust the jurisdiction of the tribunal 'in the interests of justice'.

[24] S. 16 of Arbitration and Conciliation Act,1996

[25] Hindustan Petroleum Limited v. Pinkcity Midway Petroleum[25]*:* AIR2003 SC2881

[26] P. Anand Gajapathi Raju v. P. Ganapathi Raju, AIR2000 SC1886

[27] Hindustan Petroleum Limited v. Pinkcity Midway Petroleum, AIR2003 SC2881

[28] N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72

However, the Supreme Court, in *Swiss Timing Limited v Organising Committee, Commonwealth Games*[29], declared its earlier decision in *N. Radhakrishnan v. Maestro Engineers*[30] no longer applicable, as it was given *per incuriam* the court ignored the position of law laid down in *P. Anand Gajapathi Raju v. P. Ganapathi Raju*[31] and the court failed to distinguish the case from *Hindustan Petroleum Limited v. Pinkcity Midway Petroleum*[32]. Once the decision is held *per incuriam,* it cannot be said that it was binding, even though it may not be expressly overruled.[33] Therefore, the law laid down in *N. Radhakrishnan v. Maestro Engineers*[34] that in cases of fraud or misrepresentation, the validity of the contract has to be decided by the court, is no longer applicable.

It can be very clearly inferred from the above cited cases that regardless of the nature or the validity of an agreement, the Arbitration Clause which forms a part of the agreement would still be effective.

2.4. There was no mala fide action on the part of promoters

It has been held in *Bhagwati Bai* v. *Life Insurance Corporation of India* that mere non disclosure of some immaterial facts would not per se give a right to rescission. [35] The FDA had not served any notice on the Jeevani on the results of the investigations conducted by it. According to the Agreement entered into by the Lifeline and the Promoters, they were obligated to share any vital information relating to the transaction. The fact that it was a mere

[29] Swiss Timing Limited v Organising Committee, Commonwealth Games, 2014(2) ArbLR 460

[30] *Supra* Note 28

[31] P. Anand Gajapathi Raju v. P. Ganapathi Raju, AIR2000 SC1886

[32] Hindustan Petroleum Limited v. Pinkcity Midway Petroleum, AIR 2003 SC2881

[33] Mukesh K Tripathi v Senior Divisional Manager, LIC: AIR 2004 SC 4179

[34] N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72

[35] Bhagwati Bai v. Life Insurance Corpn of India AIR 1984 MP 126

investigation thus implies that it was not vital information, without any relevance to the transaction.

The burden of proving fraud lied on the person alleging it. The burden of proving that silence amounts to fraud in particular circumstances lies upon the person who alleges it.[36] The charge of fraud, in a civil proceeding, must be established beyond reasonable doubt. [37]In any case, 'the level of proof required is extremely high and is rated on par with a criminal trial.[38] It is on Lifeline to prove the fraud beyond any reasonable doubt. To prove fraud, it must be proved that representations made were false to the knowledge of the party making them, or were such, that the party could have reasonable belief that they were true; that they were made for the purpose of being acted upon and they were believed and acted upon and caused the actual damage alleged.[39] In this case, the promoters did not have any reasonable belief that the FDA investigations may result in the accusation of violating procedures. They had no reason to believe that the report will be adverse to the operations of Jeevani or later on, Lifeline. They did not intend to cause any loss to Lifeline by not revealing the said information, thus proving that, they did not defraud Lifeline.

[36] Niaz Ahmed khan v. Parsottam Chandra 53 All 374, AIR 1931 All 154- p-499

[37] ALN Narayanan Chettyar v. Official Assigneee High Court Rangoon AIR 1941 PC 93

[38] Savithramma v. H Gurappa Reddy AIR 1996 Kant 99 at 104

[39] Gauri Shankar v. Manki Kunwar 45 All 624, AIR 1924 All 17 at 19-pg-500

III. SWASTH HAS ABUSED ITS DOMINANT POSITION BY INDULGING IN BAD FAITH LITIGATION AND SO THE INVESTIGATION OF DG CCI SHOULD NOT BE INTERFERED WITH.

3.1. The Competition Commission of India has the jurisdiction to hear the case.

It is humbly submitted before this Hon'ble Court that the Competition Commission has been conferred with an exclusive jurisdiction to look into the matters related to the abuse of dominance[40]. On the other hand, the Civil Courts have been given the jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred[41]. The Competition Act, 2002 expressly bars the jurisdiction of Civil Courts in any matter in which the CCI is empowered to determine under the Act.[42] Nothing in the Civil Procedure Code, 1908 or the Competition Act, 2002 or under any other statute in India, bars the jurisdiction of the Competition Commission of India.

In the present scenario, there has been an allegation that Swasth abused its dominance by indulging in bad faith litigation. Thus, the Competition Commission has the jurisdiction to hear the case.

3.2. The investigation of DG CCI should not be interfered with as there was a prima facie case of abuse of dominant position by Swasth

Dominant position has been defined to mean a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to — (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or

[40] Section 61 of the Competition Act, 2002

[41] Section 9, Civil Procedure Code, 1908

[42] Section 61 of the Competition Act, 2002

consumers or the relevant market in its favour.[43] It is humbly submitted before this Hon'ble Court that S.4 of the Competition Act, 2002 provides for prohibition of abuse of dominant position. The Act empowers the Commission to inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on:- (a) [44][receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their associations or trade associations; or (b) a reference made to it by the Central Government or a State Government or a statutory authority.[45]

On receipt of a complaint or reference from the Central Government or a State Government or a statutory authority or on its own knowledge or on its own information, under S. 19, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter.[46]The Act prescribes a three-step test for the determination of abuse of dominance: Defining the relevant market; Assessing dominance in the relevant market; and Establishing abuse of dominance.

However it was held in the case of *Kingfisher Airlines Ltd & Anr.* v *Competition Commission of India & Ors.*[47] that "*... it was not necessary for the Commission to first find out the relevant geographic market, relevant products market or relevant market. Such things can be found or concluded upon investigation and not necessarily before that*". In the same

[43] Explanation to Section 4 of the Competition Act, 2002

[44] Substituted for "receipt of a complaint", by the Competition (Amendment) Act, 2007, w.e.f. 20-05-2009

[45] Section 19(1), The Competition Act, 2002

[46] Section 26(1), The Competition (Amendment) Act, 2007, *w.e.f.* 20-05-2009

[47] Kingfisher Airlines Ltd & Anr. v. Competition Commission of India & Ors.. (2010)4CompLJ557(Bom)

case, it was also held that, "*The investigation is only for the purpose of collection of evidence. The investigation starts only after there is a prima facie proof of commission of cognizable offence.*"[48]

In the instant case, the petitioner was the manufacturer of 'Inventive', the premier life-saving drug available in the market. The respondent, Lifeline, had developed a generic life-saving drug named 'Novel', which was considerably cheaper than all other life-saving drugs available in the market. The petitioner then obtained an injunction contending that 'Novel' was substantially similar to 'Inventive', and was based on certain IPRs which were assigned to Swasth.

It is humbly submitted that Lifeline was developing 'Novel' and releasing it as per the provisions laid down in the Bolar Provision of the TRIPS Agreement. India, which is a party to the TRIPS Agreement, has laid down Bolar Provision in the Patents Act. It is laid down in the Patents Act that For the purposes of this Act, — (a) any act of making, constructing, using, selling or importing a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being in force, in India, or in a country other than India, that regulates the manufacture, construction, use, sale or import of any product.[49] It is thereby submitted that Lifeline was in no way infringing the IPRs of the petitioner, and the injunction was uncalled for.

It is humbly submitted that the action taken by the petitioner may result in patent-linkage. A preliminary 400 page report dated 28-11- 2008, by the competition authorities of the European Union notes that Patent linkage refers to the practice of linking the granting of MA (market authorization), the pricing and reimbursement status or any regulatory approval

[48] *Id.*

[49] Section 107A (a) of The Patents Act, 1970

for a generic medicinal product, to the status of a patent (application) for the originator reference product (...) patent-linkage is considered unlawful under Regulation (EC) No 726/2004 and Directive (EC) No.2001/83.[50] It has been held by the Hon'ble Delhi High Court in the case of *Bayer Corporation & Ors.* v. *Cipla, Union of India & Ors*[51]., that the practice of patent-linkage cannot be read into any existing Indian provisions, and if provided could result in many undesirable results. It is therefore submitted that the CCI, on receiving the complaint and after going through it, were of the opinion that the Swasth may have been indulged in abuse of dominant position by advocating patent-linkage.

In *Intel Case*[52] strong entry barriers were found to be present on account of significant IP rights owned by Intel. Combined with the scale and scope that Intel enjoyed it accorded Intel a position of dominance. Strong entry barrier is one of the factors which determine abuse of dominant position. The Intel Case can be linked to the present case, as Swasth used its IPRs for obtaining an injunction against Lifeline, and restrained it from releasing 'Novel'.

It is therefore submitted that by taking all these into account, the CCI was of a *prima facie* view that the petitioner, Swasth might have abused its dominant position in the market. It has therefore ordered the DG CCI to investigate into the matter and submit a report. As already submitted, the investigation is a process of collection of evidences, and it does not in any way cause any adverse effect on the petitioner.

It is therefore humbly submitted that the DG CCI investigation should not be interfered with.

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[50]Available on http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf [last accessed on 12-7-2009]

[51] Bayer Corporation & Ors. v. Cipla, Union of India & Ors, ILR(2009)Supp.(2)Delhi145

[52]M/S ESYS Information Technologies Pvt. Ltd. v. Intel Inc. & Others Case no 48 of 2011

PRAYER

Wherefore, in the light of facts of the case, issues raised, arguments advanced and authorities cited, it is humble prayer of the Respondents that this Hon'ble Supreme Court may be pleased to:

Issue an appropriate order or direction and,

- **Declare that the Foreign Lenders are not Creditors of Jeevani and set aside the appeal,**
- **Direct the Petitioners to Arbitration to resolve the issue.**
- **Set aside the appeal to quash proceedings against Swasth**,

And pass any other order in favour of the Respondent that it may deem fit in the ends of justice, equity, expediency and good conscience. All of which is respectfully submitted.

Place:

Date:

S/d _____

(Counsel for Respondents)